

§ 25.2523(b)-1

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principles set forth in § 25.2512-5(d) or, for certain prior periods, § 25.2512-5A.

[T.D. 7238, 37 FR 28733, Dec. 29, 1972, as amended by T.D. 7955, 49 FR 19998, May 11, 1984, T.D. 8522, 59 FR 9658, Mar. 1, 1994; T.D. 8540, 59 FR 30103, June 10, 1994; 60 FR 16382, Mar. 30, 1995]

§ 25.2523(b)-1 Life estate or other terminable interest.

(a) *In general.* (1) The provisions of section 2523(b) generally disallow a marital deduction with respect to certain property interests (referred to generally as *terminable interests* and defined in paragraph (a)(3) of this section) transferred to the donee spouse under the circumstances described in paragraph (a)(2) of this section, unless the transfer comes within the purview of one of the exceptions set forth in § 25.2523(d)-1 (relating to certain joint interests); § 25.2523(e)-1 (relating to certain life estates with powers of appointment); § 25.2523(f)-1 (relating to certain qualified terminable interest property); or § 25.2523(g)-1 (relating to certain qualified charitable remainder trusts).

(2) If a donor transfers a terminable interest in property to the donee spouse, the marital deduction is disallowed with respect to the transfer if the donor spouse also—

(i) Transferred an interest in the same property to another donee (see paragraph (b) of this section), or

(ii) Retained an interest in the same property in himself (see paragraph (c) of this section), or

(iii) Retained a power to appoint an interest in the same property (see paragraph (d) of this section).

Notwithstanding the preceding sentence, the marital deduction is disallowed under these circumstances only if the other donee, the donor, or the possible appointee, may, by reason of the transfer or retention, possess or enjoy any part of the property after the termination or failure of the interest therein transferred to the donee spouse.

(3) For purposes of this section, a distinction is to be drawn between “property,” as such term is used in section 2523, and an “interest in property.” The “property” referred to is the underlying property in which various inter-

ests exist; each such interest is not, for this purpose, to be considered as “property.” A “terminable interest” in property is an interest which will terminate or fail on the lapse of time or on the occurrence or failure to occur of some contingency. Life estates, terms for years, annuities, patents, and copyrights are therefore terminable interests. However, a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity or term for years, is not a terminable interest.

(b) *Interest in property which another donee may possess or enjoy.* (1) Section 2523(b) provides that no marital deduction shall be allowed with respect to the transfer to the donee spouse of a “terminable interest” in property, in case—

(i) The donor transferred (for less than an adequate and full consideration in money or money’s worth) an interest in the same property to any person other than the donee spouse (or the estate of such spouse), and

(ii) By reason of such transfer, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein transferred to the donee spouse.

(2) In determining whether the donor transferred an interest in property to any person other than the donee spouse, it is immaterial whether the transfer to the person other than the donee spouse was made at the same time as the transfer to such spouse, or at any earlier time.

(3) Except as provided in § 25.2523(e)-1 or 25.2523(f)-1, if at the time of the transfer it is impossible to ascertain the particular person or persons who may receive a property interest transferred by the donor, such interest is considered as transferred to a person other than the donee spouse for the purpose of section 2523(b). This rule is particularly applicable in the case of the transfer of a property interest by the donor subject to a reserved power. See § 25.2511-2. Under this rule, any property interest over which the donor reserved a power to revest the beneficial title in himself, or over which the donor reserved the power to name

new beneficiaries or to change the interests of the beneficiaries as between themselves, is for the purpose of section 2523(b), considered as transferred to a "person other than the donee spouse." The following examples, in which it is assumed that the donor did not make an election under sections 2523(f)(2)(C) and (f)(4), illustrate the application of the provisions of this paragraph (b)(3):

Example 1. If a donor transferred property in trust naming his wife as the irrevocable income beneficiary for 10 years, and providing that, upon the expiration of that term, the corpus should be distributed among his wife and children in such proportions as the trustee should determine, the right to the corpus, for the purpose of the marital deduction, is considered as transferred to a "person other than the donee spouse."

Example 2. If, in the above example, the donor had provided that, upon the expiration of the 10-year term, the corpus was to be paid to his wife, but also reserved the power to revest such corpus in himself, the right to corpus, for the purpose of the marital deduction, is considered as transferred to a "person other than the donee spouse."

(4) The term "person other than the donee spouse" includes the possible unascertained takers of a property interest, as, for example, the members of a class to be ascertained in the future. As another example, assume that the donor created a power of appointment over a property interest, which does not come within the purview of § 25.2523(e)-1. In such a case, the term "person other than the donee spouse" refers to the possible appointees and takers in default (other than the spouse) of such property interest.

(5) An exercise or release at any time by the donor (either alone or in conjunction with any person) of a power to appoint an interest in property, even though not otherwise a transfer by him is considered as a transfer by him in determining, for the purpose of section 2523(b), whether he transferred an interest in such property to a person other than the donee spouse.

(6) The following examples illustrate the application of this paragraph. In each example, it is assumed that the donor made no election under sections 2523(f)(2)(C) and (f)(4) and that the property interest that the donor trans-

ferred to a person other than the donee spouse is not transferred for adequate and full consideration in money or money's worth:

Example 1. H (the donor) transferred real property to W (his wife) for life, with remainder to A and his heirs. No marital deduction may be taken with respect to the interest transferred to W, since it will terminate upon her death and A (or his heirs or assigns) will thereafter possess or enjoy the property.

Example 2. H transferred property for the benefit of W and A. The income was payable to W for life and upon her death the principal was to be distributed to A or his issue. However, if A should die without issue, leaving W surviving, the principal was then to be distributed to W. No marital deduction may be taken with respect to the interest transferred to W, since it will terminate in the event of his issue will thereafter possess or enjoy the property.

Example 3. H purchased for \$100,000 a life annuity for W. If the annuity payments made during the life of W should be less than \$100,000, further payments were to be made to A. No marital deduction may be taken with respect to the interest transferred to W; since A may possess or enjoy a part of the property following the termination of W's interest. If, however, the contract provided for no continuation of payments, and provided for no refund upon the death of W, or provided that any refund was to go to the estate of W, then a marital deduction may be taken with respect to the gift.

Example 4. H transferred property to A for life with remainder to W provided W survives A, but if W predeceases A, the property is to pass to B and his heirs. No marital deduction may be taken with respect to the interest transferred to W.

Example 5. H transferred real property to A, reserving the right to the rentals of the property for a term of 20 years. H later transferred the right to the remaining rentals to W. No marital deduction may be taken with respect to the interest since it will terminate upon the expiration of the balance of the 20-year term and A will thereafter possess or enjoy the property.

Example 6. H transferred a patent to W and A as tenants in common. In this case, the interest of W will terminate upon the expiration of the term of the patent, but possession and enjoyment of the property by A must necessarily cease at the same time. Therefore, since A's possession or enjoyment cannot outlast the termination of W's interest, the provisions of section 2523(b) do not disallow the marital deduction with respect to the interest.

(c) *Interest in property which the donor may possess or enjoy.* (1) Section 2523(b) provides that no marital deduction is

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allowed with respect to the transfer to the donee spouse of a “terminable interest” in property, if—

(i) The donor retained in himself an interest in the same property, and

(ii) By reason of such retention, the donor (or his heirs or assigns) may possess or enjoy any part of the property after the termination or failure of the interest transferred to the donee spouse. However, as to a transfer to the donee spouse as sole joint tenant with the donor or as tenant by the entirety, see § 25.2523(d)-1.

(2) In general, the principles illustrated by the examples under paragraph (b) of this section are applicable in determining whether the marital deduction may be taken with respect to a property interest transferred to the donee spouse subject to the retention by the donor of an interest in the same property. The application of this paragraph may be further illustrated by the following example, in which it is assumed that the donor made no election under sections 2523(f)(2)(C) and (f)(4).

Example. The donor purchased three annuity contracts for the benefit of his wife and himself. The first contract provided for payments to the wife for life, with refund to the donor in case the aggregate payments made to the wife were less than the cost of the contract. The second contract provided for payments to the donor for life, and then to the wife for life if she survived the donor. The third contract provided for payments to the donor and his wife for their joint lives and then to the survivor of them for life. No marital deduction may be taken with respect to the gifts resulting from the purchases of the contracts since, in the case of each contract, the donor may possess or enjoy a part of the property after the termination or failure of the interest transferred to the wife.

(d) *Interest in property over which the donor retained a power to appoint.* (1) Section 2523(b) provides that no marital deduction is allowed with respect to the transfer to the donee spouse of a terminable interest” in property if—

(i) The donor had, immediately after the transfer, a power to appoint an interest in the same property, and

(ii) The donor’s power was exercisable (either alone or in conjunction with any person) in such manner that the appointee may possess or enjoy any part of the property after the termi-

nation or failure of the interest transferred to the donee spouse.

(2) For the purposes of section 2523(b), the donor is to be considered as having, immediately after the transfer to the donee spouse, such a power to appoint even though the power cannot be exercised until after the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur. It is immaterial whether the power retained by the donor was a taxable power of appointment under section 2514.

(3) The principles illustrated by the examples under paragraph (b) of this section are generally applicable in determining whether the marital deduction may be taken with respect to a property interest transferred to the donee spouse subject to retention by the donor of a power to appoint an interest in the same property. The application of this paragraph may be further illustrated by the following example:

Example. The donor, having a power of appointment over certain property, appointed a life estate to his spouse. No marital deduction may be taken with respect to such transfer, since, if the retained power to appoint the remainder interest is exercised, the appointee thereunder may possess or enjoy the property after the termination or failure of the interest taken by the donee spouse.

[T.D. 6334, 23 FR 8904, Nov. 15, 1958; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 8522, 59 FR 9659, Mar. 1, 1994]

§ 25.2523(c)-1 Interest in unidentified assets.

(a) Section 2523(c) provides that if an interest passing to a donee spouse may be satisfied out of a group of assets (or their proceeds) which include a particular asset that would be a non-deductible interest if it passed from the donor to his spouse, the value of the interest passing to the spouse is reduced, for the purpose of the marital deduction, by the value of the particular asset.

(b) In order for this section to apply, two circumstances must coexist, as follows:

(1) The property interest transferred to the donee spouse must be payable out of a group of assets. An example of a property interest payable out of a group of assets is a right to a share of